

a **BSN COMMERCIAL BANK (MALAYSIA) BHD**

v.

ZAQ CONSTRUCTION SDN BHD & ORS

b HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-1194-2000]
21 MAY 2001

c **CIVIL PROCEDURE:** *Default judgment - Default of defence - Setting aside - Judgment entered whilst defendants' application for extension of time to file defence was pending - Whether judgment rendered irregular*

d **CIVIL PROCEDURE:** *Default judgment - Setting aside - Copy of draft judgment not submitted by winning party to opposite party for approval pursuant to O. 41 r. 8(1) Rules of the High Court 1980 - Whether a ground for setting aside judgment - Whether a time limit imposed for submission - Whether O. 42 r. 8(1) applicable to default judgment in view of O. 19 r. 2(1) RHC*

e This was the plaintiff's appeal against the decision of the Senior Assistant Registrar ('SAR'). The SAR had set aside the judgment in default of defence ('default judgment') obtained by the plaintiff against the defendants at the hearing of the defendants' application for extension of time. The issues were: (1) whether the default judgment was irregular as it had been entered whilst the defendants' application for extension of time was pending; and (2) whether the plaintiff's failure to submit a draft copy of the default judgment to the defendants pursuant to O. 42 r. 8 Rules of the High Court 1980 ('RHC') was a ground for setting aside the default judgment.

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Held:

g [1] On whether there would be no default for the entering of the default judgment should the defendant succeed in getting the extension of time and duly served his defence, the court was of the view that that was not a sound proposition. In those circumstances, the default judgment should be set aside because should the defendant fail to get the extension of time, the entering of the default judgment would then be right.

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[2] To prevent execution of the default judgment pending disposal of the defendant's application for extension of time, the defendants should apply for a stay of execution and if they succeed in getting the extension of time, the default judgment should then be set aside. The judgment was not bad simply because of the trouble that the defendants had been put through was unnecessary.

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[3] Order 42 r. 8 RHC is a procedure subsequent to the giving of a judgment (or the making of an order), for the settling of the terms of the judgment by requiring the winning party to first submit a copy of the draft thereof to the solicitor of the other party, or if the other party has no solicitor, to the registrar. No time limit is fixed for the winning party to do so. The failure thereof may result in the winning party facing difficulties in executing the judgment but that cannot mar the judgment to merit it being set aside. The judgment remains good. Further, since no time limit is provided for the winning party to make that first move, it followed therefore that there can be no possibility of the winning party failing to make that first move.

[4] The court agreed with the plaintiff that O. 42 r. 8 RHC does not apply in the case of a judgment in default of defence entered under O. 19 r. 2(1) RHC. To argue that it applies, one would first of all have to read the words “a judgment ... is given” in r. 8(1) of O. 42 thereof as “a judgment in default of defence ... is entered”. Further, a judgment in default of defence under O. 19 r. 2(1) RHC is entered after filing Form 79(a) which is signed by the registrar. It would make no sense to insist that the procedure of O. 42 r. 8 RHC should be observed in view of the registrar having signed that form.

[Appeal allowed; default judgment restored.]

Case(s) referred to:

Kewangan Bersatu Bhd v. Yap Ah Yit & Ors [1999] 1 CLJ 429 (not foll)

Metrojaya Bhd & Anor v. BTC Clothier Sdn Bhd & Anor [1996] 5 MLJ 45 (dist)

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 5(1), (2), (3), O. 18 r. 2(1), O. 19 r. 2(1), O. 42 r. 8(1)

For the plaintiffs - Sharifah Shewikar Alhabshi (Mae Taye with her); M/s Taye & Co

For the defendants - Gregory Dicom (Anita Mohan with him); M/s AG Dicom & Co

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

The primary question that arises on this appeal is whether the judgment in default of defence entered by the plaintiffs on 28 September 2000 against the first, second and third defendants (“the defendants”) was regular or irregular.

- a* The defendants had not served their defence within the period prescribed by O. 18 r. 2(1), but, by consent of the plaintiffs, the period had been extended to 5 September 2000, as allowed by O. 3 r. 5(3). Next day, 6 September, the plaintiffs intimated to the defendants that they would be entering judgment since the defendants had not served their defence. The defendants' request for another three weeks' extension of time made on the same day was turned down the next day, 7 September.

- c* The defendants did not file or serve their defence – and to date they have not done so – but on 13 September the defendants filed their summons for extension of time. The plaintiffs had not yet entered judgment. They did so only on 28 September, about two weeks after the summons for extension of time was filed and during the pendency of that application. It was done under O. 19 r. 2(1).

- d* The application for extension of time must have been made by virtue of O. 3 r. 5(1). Although the application was made after the time extended by consent had expired – eight days after – that was alright, because O. 3 r. 5(2) allows it.

- e* On 2 November 2000, when counsel for the parties appeared before the learned senior assistant registrar for the hearing of the defendants' application for extension of time, the defendants' counsel, having been informed of the entering of judgment, orally applied to the senior assistant registrar for setting aside of the default judgment. Despite the objection of the plaintiffs' counsel, the senior assistant registrar set aside the default judgment. From that decision, the plaintiffs now appeal. The defendants' application for extension of time has not been heard. I am told that it has been postponed to await the outcome of this appeal.

- g* As I said, the primary question that arises on this appeal is whether the default judgment was regular or irregular, and the question arises because it was entered during the pendency of the defendants' application for extension of time. The plaintiffs' submission boils down to that the defendants had failed to serve their defence before the expiration of the period extended by consent and the mere filing of an application for extension of time did not operate to prevent the plaintiffs from exercising their right to enter default judgment, the period not having been extended. The defendants' counsel has not able to show any authority that lays down that default judgment cannot be entered during the pendency of an application for extension of time to serve the defence. *Metrojaya Bhd & Anor v. BTC Clothier Sdn Bhd & Anor* [1996] 5 MLJ 45, which was particularly cited by the defendants' counsel, is no such authority. I shall give my reasons later.

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I have given thought to adopting as a sound proposition that default judgment ought not to be entered during the pendency of an application for extension of time to file the defence and that the reason is because should the defendant succeed in getting extension of time, and duly serves his defence, there would have been no default and the judgment will be seen as one that should not have been entered. That is the strongest reason that I have been able to think of for saying that default judgment ought not to be entered. But I do not think that is a sound proposition because if the defendant succeeded in getting extension of time, and duly served his defence, to put matters right for the defendant the default judgment will simply have to be set aside. Besides it must be remembered that, on the other hand, if the defendant failed to get extension of time, the entering of default judgment would be proved to have been right.

It may appear unjust to the defendants in this case to uphold the default judgment that was entered during the pendency of their application for extension of time because, to protect themselves, they might have to apply for a stay of execution pending disposal of their application, which they might or might not succeed in getting, but if they succeeded in getting extension of time all the jeopardy that they had faced and the trouble they had been put to will be proved to have been unnecessary. But that is unavoidable in the circumstances, as can be seen if we supposed that the plaintiffs had done the thing that would be right beyond controversy. Supposing the plaintiffs had entered summary judgment between 6 September and 13 September, that is after the expiry of the extended period but before the defendants filed their application for extension of time, it would be beyond dispute that the plaintiffs were entitled to do so and were right in doing so. The defendants then on 13 September filed their application for extension of time. To prevent execution pending disposal of their application the defendants would still have to apply for a stay of execution and if they succeeded in getting extension of time the default judgment would have to be set aside and the jeopardy they had faced and the trouble they had been put to would likewise be proved to have been unnecessary. It cannot be right to say that because of those consequences, seemingly unfair, of entering of judgment when the application for extension of time was pending, therefore the judgment was bad, and it cannot be right because those also would be the consequences even had the entering of judgment been undoubtedly right, that is to say, had it been done before the defendants filed their application for extension of time.

I revert now to the *Metrojaya* case (*supra*). In that case, several days after the expiry of the time limited for filing the defence, the plaintiffs filed an application for judgment in default of defence. Unlike in the present case, where the claim is for a liquidated sum, in that case an application was

- a* necessary because the action was for, *inter alia*, an injunction. Several days afterwards the defendants filed and served a defence, unlike in the present case, and also an application for extension of time to file the defence. Several days afterwards the plaintiffs filed an application to set aside the defence.
- b* All the three applications came before Syed Ahmad Aidid J, who decided to hear the application for extension of time first because the outcome of the other two applications would depend on the outcome of that application. After hearing and considering submissions, he allowed that application and accordingly dismissed the other two applications.
- c* It would appear that counsel for the plaintiffs had urged the learned judge to reject the reason given by the defendants for the delay in filing the defence, but the learned judge, after considering authorities, decided that he ought not to ignore the defence that had been filed, even though it had been filed out of time without leave because from it he saw the existence of a real dispute, by reason of which he decided that it would be a waste of time to shut out
- d* the defence by refusing extension of time because, if that were done and judgment in default were consequently entered, the defendants could apply to set aside the judgment in default.
- e* As I understand the defendants' counsel in this appeal, it is because the learned judge decided to deal with the application for extension of time before the other two applications that it was submitted that that case is an authority for the proposition that so long as there is an application for extension of time, judgment in default cannot be entered. As I see it, the decision in that case to hear the application for extension of time first was a matter of exercise of
- f* judicial wisdom, in face of the existence of the three applications. It was obviously the wisest course to dispose of that application first, as it would dispose of the other two applications. Another judge in similar circumstances might, however, in a momentary loss of foresight, have decided to deal first with the plaintiffs' application for judgment in default. Let us suppose that
- g* he then, after considering the merits of the application, decided to allow judgment in default. He would still have to hear the application for extension of time, and if, after hearing it, he found that extension ought to be granted and he granted it, as Syed Ahmad Aidid J did, the judgment in default would have to be set aside by reason of the fact that with the extension of time, the
- h* defence having been filed, it could no longer stand as a judgment in default. That would be the unwisdom of disposing of the application for judgment in default before disposing of the application for extension of time. But that would not have been an irregularity rendering the judgment in default a nullity and entitling the defendants to have it set aside as of right. The most that
- i* they could do was to apply for a stay of execution pending the disposal of

their application for extension of time, if it was not going to be heard soon, on the ground that if it was allowed they would be entitled to have the judgment in default set aside. a

That is why I do not consider that case to be an authority that supports the defendants' contention that the judgment in default in this case was irregular and was rightly set aside. I may add that in that case the learned judge was moved to allow extension of time because of the existence in the file of a defence which disclosed a genuine dispute, a circumstance which is absent in the present case. b

I am unable to think of a sound reason for holding that the entering of default judgment in this case during the pendency of the application for extension of time rendered the judgment irregular. It was regular and it follows that it should not have been set aside on that account. c

Another reason has been advanced in this appeal as meriting the setting aside of the judgment in default, and that is the failure of the plaintiffs, as "the party in whose favour a judgment or order is given or made", to comply with the requirement of O. 42 r. 8(1) that "a copy of the draft shall be submitted for approval to the solicitor" of the defendants. In *Kewangan Bersatu Bhd v. Yap Ah Yit & Ors* [1999] 1 CLJ 429, such a failure appears to be one of the reasons why the judgment in default of defence that had been entered was set aside. d
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The purpose of O. 42 r. 8 is to provide the procedure, subsequent to the giving of a judgment (or the making of an order), for the settling of the terms of the judgment in order to obtain an instrument that may be regarded as a formal written certificate in proof of the judgment. The procedure requires the winning party to make the first move by submitting a copy of the draft instrument to the solicitor for the other party or, if the other party has no solicitor, to the registrar. No time limit is fixed for the winning party to do so. If the winning party fails to make the first move, he will not obtain the instrument and will suffer the consequence that he will be at a disadvantage in the matter of doing or establishing something that requires the existence of the instrument. For example, if the plaintiff is the winning party, without the instrument he may face difficulties in executing the judgment. f
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That being the purpose of O. 42 r. 8, in my judgment the failure of the winning party to comply with the requirement of making the first move to obtain the certificate of the judgment cannot, in reason, have the consequence of marring the judgment itself so as to merit it being set aside. The judgment remains good. The only consequence of the winning party's failure is that he will not get the certificate of the judgment. Moreover, since no time limit is h
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- a* provided for making the first move, technically it is not possible at any time to speak of failure to make the first move. Until the first move is made, it is proper to say that the first move has not yet been made, but it cannot be said that there has been a failure to make it and therefore a non-compliance with O. 42 r. 8(1).
- b* I moreover agree with the plaintiffs' counsel that O. 42 r. 8 does not apply in the case of a judgment in default of defence entered under O. 19 r. 2(1). To argue that it applies, one would have first of all to read the words "a judgment ... is given" in r. 8(1) as "a judgment in default of defence ... is entered". Now, a judgment in default of defence under O. 19 r. 2(1) is entered
- c* after filing the form of judgment in form (a) of Form 79 and obtaining the registrar's signature to the form. The registrar having signed the form, it would make no sense to insist that the procedure of O. 42 r. 8 for settling the terms of the judgment be observed.
- d* I allow the appeal and order that the default judgment be restored. The learned senior assistant registrar should proceed to hear the application for extension of time and give an early date for it. The fate of the default judgment will depend on it. The costs of this appeal shall follow the outcome of that application.
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